

ESPA CONCEPTUAL SETTLEMENT FRAMEWORK

09-15-04

1. Introduction.

This settlement framework is designed to effectuate a net change of 600,000 to 900,000 acre-feet annually in the Eastern Snake Plain Aquifer (ESPA) water budget through implementation of water supply, water management, and water demand reduction measures. While the attributes of the water budget where the changes must occur are known, detailed design of the specific measures and the exact amount of change those measures will contribute toward effectuating the water budget change remain to be finalized. Thus, the framework proposes target goals for each category of measures, an implementation plan with check-in dates to ensure satisfactory progress is being made toward achieving the target goals and, if not, a mandatory process for requiring changes to the framework to achieve the 600,000 to 900,000 acre-feet annual change in the ESPA water budget.

The framework is premised on demonstrating real not paper changes to the ESPA water budget. A monitoring program is proposed as well as changes to water administration to ensure the changes to the ESPA water budget occur and are not subverted by future water management decisions.

Another premise of this framework is that the costs for those measures providing mitigation for senior water right holders will be the responsibility of junior water right holders, and that implementation of these measures by the junior water right holders will constitute mitigation for out of priority diversions. The costs for other measures in the framework will be paid for by those receiving the benefit of those measures.

2. Basis for the Framework Goal.

The framework goal is based upon “the unquestioned rule in [Idaho] that priority of appropriation shall give the better right between those using the water.” *Beecher v. Cassia Creek Irrigation Company*, 66 Idaho 1, 9 (1944). Thus, absent any recognized defense, a senior water right holder is entitled as against a junior water right holder to that quantity of water he is able to apply to beneficial use within the limit of his appropriation that would be available from the source absent the diversion of water under the junior water right.

While it is unrealistic to assume that the parties will agree on all of the principles of the prior appropriation doctrine that apply to the current controversy, there is no real dispute that the depletionary effects caused by the exercise of junior priority ground water rights represent the outer bounds of any potential relief through litigation. There is also no real dispute that a senior water right holder is only entitled to that amount of curtailment necessary to satisfy any actual injury.

Based upon prior ground water modeling, it is estimated that curtailment of all ground water rights junior to July 13, 1962 would result in the gain of about 240,000 acre feet of water annually in the Thousand Springs area at steady state conditions. Since ground water rights junior to July 13, 1962 represent about one-half or less of all ground water rights, curtailment of all ground water rights is likely to produce about 480,000 acre-feet of water, or less, annually in the Thousand Springs area at steady state conditions. Again these estimates reflect the optimistic end of the spectrum of potential recovery and do not take into account the fact that many ground water rights are senior in priority to many of the spring water rights in the Thousand Springs area. In addition, these estimates do not reflect the fact that some of the more senior water rights could be mitigated by providing water from other sources, nor do they take into account defenses to curtailment such as the futile call doctrine, requirements for reasonable means of diversion, and interference with full economic development of the aquifer that would be asserted in litigation.

In Water District 120, the senior water right holders have a combination of natural flow and storage water rights. Junior ground water diversions impact both the natural flow rights and storage rights. The estimated impact of flow reductions to senior surface water right holders from ground water diversions based upon 1992 conditions is about 300,000 acre-feet. IDWR, *Upper Snake River Basin Study* at 74 (January, 1997). Again, this value is based upon calculated depletions to the rights of surface water users and does not take into account any legal defenses that might be raised in litigation.

While these reach gain estimates can be reconfirmed through use of the reformulated ESPA ground water model and the water rights accounting program, the combined reach gain value represents the optimistic end of the results likely to be achieved through litigation. These estimates formed the basis for the proposed goal of a 600,000 to 900,000 acre-feet net change annually in the ESPA water budget.

One question this proposal does not yet address is the apportionment of the measures between Water District 120 and 130. It is anticipated that apportionment of the mitigation measures would be accomplished through use the ESPA ground water model based on the relative depletions occurring within each district. This step would occur prior to finalizing the list of proposed measures, and separate goals would be established for each area.

3. Settlement Principles

The following settlement principles were identified following discussions with affected stakeholders:

- A. Settlement terms must be consistent with the prior appropriation doctrine.
- B. Mitigation will be allocated based upon potential injury to senior priority water rights.

- C. Junior water right holders will be deemed to have mitigated for any injury to senior water rights upon completion of measures assigned under the final agreement.
- D. Acquisitions and/or rentals called for under the settlement framework will be based upon the principle of willing buyer/willing seller.
- E. Implementation targets will be established and a mandatory process for addressing program shortcomings will be developed.
- F. Effectiveness of the measures will be determined through use of the reformulated ESPA ground water model and a monitoring program.
- G. The State will be responsible for ensuring the settlement framework is implemented.

4. Framework Targets

- A. ***Water Supply Projects*** (350,000 acre-feet to 500,000 acre-feet annually)
 - 1. The State will seek to acquire 200,000 to 260,000 acre-feet of natural flow or storage water rights, more or less, above Hells Canyon Dam from willing sellers. If water is acquired below Milner, the water will be exchanged for storage water rented from the Water District 01 rental pool for flow augmentation by the Bureau of Reclamation. This proposed exchange would not require water to be exchanged when storage water would not otherwise be provided under the terms of the Bureau of Reclamation flow augmentation program.

The Idaho Water Resource Board will issue revenue bonds for these acquisitions within one to two years. Acquisitions will occur on a staged basis over 5 years.

Repayment of the revenue bonds will be determined based upon the benefits accrued. Water acquired to provide direct mitigation to senior priority right holders will be paid for by junior priority water right holders through an annual assessment for the life of the bonds. Water acquired to exchange will be paid for by a combination of assessments to water right holders benefiting from the ESA coverage and Bureau of Reclamation rental fees.
 - 2. Reduction of ground water depletions of 100,000 acre-feet more or less will be obtained through existing and future ground water to surface water conversions. This program is premised upon obtaining a reliable water supply to sustain these conversions over

the long-term. The extent of reliability will have to be negotiated and actual benefits determined as the surface water acquisition program is developed. It is anticipated that the EQUIP program will be used to help fund these efforts. The conversions will be on a staged basis over 5 years with some of the conversions occurring over a second 5-year period.

3. A managed recharge program designed to provide an average annual benefit of 200,000 acre-feet is proposed. Site-specific recharge projects will be pursued above springs, to the extent feasible. The cost of these site-specific recharge projects will be assessed against junior water right holders.

The State will acquire lands for managed recharge. Funding for managed recharge will be assessed against those benefiting from the recharge. The program will be designed to avoid injury to existing water rights.

The recharge will program will be staged over a 10 year period; however, site-specific recharge will be prioritized.

4. Other water supply projects identified from a feasibility study to be conducted by IDWR. This study will be completed within two-years.

- B. ***Water Management Projects*** (100,000 to 150,000 acre-feet annually). Through a combination of the ESPA grant program and other projects being developed by IDWR a net reduction in demand on the springs of 100,000 to 150,000 acre-feet will be achieved. Funding for these projects will come through the EQUIP program and matching grants and loans. These projects will be identified and authorized for construction within 2 years.

- C. ***Reductions in Demand*** (150,000 to 250,000 acre-feet annually from willing buyers/willing sellers). A program to reduce aquifer and spring flow demands will be implemented. These reductions will occur through a combination of purchases and/or retirements through a CREP program. It is anticipated that the Idaho Water Resource Board will issue revenue bonds for purchase of water rights and/or subordination agreements. Repayment of the revenue bonds will occur through an assessment on junior priority water right holders who derive a benefit from individual actions. These reductions will be implemented on a staged basis over a 5-year period.

The CREP retirements will be funded through 80% federal dollars matched by a 20% state in-kind contribution. The CREP program is

expected to be in place by 2006 and actual enrollment will occur within a 2-year period after the program is approved.

5. Monitoring Program. IDWR will establish an on-going water measurement and monitoring program for the ESPA consisting of the following:

- A. Updating of the ESPA ground water model on a periodic basis, including the following:
 - 1. Continue existing return flow measurements;
 - 2. Identify or establish sentinel observation wells for annual measurements of ground water levels and conduct mass ground water level measurements as necessary, probably not more often than every 5 years;
 - 3. Collect continuous spring flow measurements on sentinel springs within the following reaches:
 - a. Blackfoot to Neeley: Spring Creek or other indicator spring in Blackfoot/Neeley Reach (need to resolve access issues with Shoshone-Bannock Tribe on Spring Creek).
 - b. Devil's Washbowl to Buhl: Devil's Corral or Vineyard Creek; Blue Lakes; Crystal Springs.
 - c. Buhl to Thousand Springs: Briggs Springs and Box Canyon Springs.
 - d. Thousand Springs: White Springs and Big Springs, if feasible.
 - e. Malad: Malad, if feasible.
 - 4. Update water budget;
 - 5. Review IDWR tributary underflow study and develop and implement a methodology to improve quantification of tributary underflow; and
 - 6. Develop and implement a methodology for updating evapotranspiration. (NASA is suspending the thermal band on spatial imagery used by IDWR for determining evapotranspiration.)

- B. Continuation of ESPA technical advisory committee review of ESPA modeling activities.
 - C. Completion of agreed upon ESPA modeling scenarios to implement settlement.
 - D. Update surface water accounting model to provide transparency, near real-time output, and an improved data bridge or link between the ESPA ground water model and surface water accounting model.
 - E. Other surface water modeling tools to assist with management of available surface water.
 - F. The estimated cost of the program is expected to be \$2 million or less annually. This program will be funded through an assessment on all surface water and ground water right holders diverting from King Hill and above.
6. **Water Right Enforcement Program.** Existing water rights administration programs will be reviewed and modified: 1) to provide for adequate funding for the appointment and equipping of a sufficient number of watermasters to ensure all water rights are regulated in accordance with the prior appropriation doctrine; 2) to ensure all watermasters meet minimum qualifications; and 3) to ensure watermasters are fair and impartial. In addition, existing water rights administration programs will be reviewed and modified: 1) to empower water right holders to implement water management projects; 2) to hold water rights for recharge and mitigation; 3) to require the participation of all water right holders deriving benefits; and 4) to eliminate or consolidate duplicative programs. This effort will be undertaken and recommended during the next legislative session.
7. **ESPA Aquifer Management Plan.** IWRB will develop an ESPA water management plan in consultation with affected water right holders within 5 years. This effort will include development of a domestic ground water use policy.
8. **Drought Relief.** The Congressional delegation will pursue opportunities for extension of the federal farm programs to provide for drought relief assistance for water right holders dependent on spring discharges and other water right holders.
9. **Measurable Milestones.** Milestones for achieving the goal will be established with a process for corrective action or off ramps in the event the interim and long-term goals are not achieved.
10. **Implementation Plan.** The Interim Natural Resources Issues Committee monitor implementation of the framework and, in consultation with the stakeholders, make adjustments to the framework as necessary to ensure that the overall goal is being achieved.